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No. 87-2093

IN THE

Supreme Court of the United States

October Term, 1987

INDIANA HOSPITAL, *et al.*,

Petitioners,

vs.

RALPH J. MILLER, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

This action arises from the ongoing concerted actions of Indiana Hospital and certain individuals (hereinafter referred to as the "Hospital") to suppress and curtail the holdings and medical services of Dr. Ralph Miller in the health care industry in Indiana County, Pennsylvania. The conduct is alleged to be in violation of the Sherman Act, 15 U.S.C. §§1 and 2, and relief therefrom is sought pursuant to the Clayton Act, 15 U.S.C. §§15 and 26. Part of the conduct at issue involves the termination of Dr. Miller's admitting and staff privileges as a urological surgeon at the Hospital in 1977, after his having held such privileges for nineteen years. Dr. Miller agrees with, and herein adopts, the statement of facts set forth in the opinion of the Court of Appeals for the Third Circuit in this case. *See, Miller v. Indiana Hospital*, 843 F.2d 139 (3rd Cir. 1988).

All parties filed cross-motions for summary judgment in the district court, which motions were denied (App. at 42). The court's opinion supporting the denials adopted the legal standard for summary judgment in antitrust cases concerning hospital staff privileges, as set forth in *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D.Pa. 1982). Under the *Pontius* standard, the trial court, without any consideration of the evidence of record demonstrating an antitrust violation, determines as a matter of law whether the hospital's stated reasons for termination are supported by substantial evidence. If so, the restraint is deemed reasonable for antitrust purposes. Also under *Pontius*, the procedures used in the termination decision must be shown not to be substantially defective.

Following the district court's initial decision, the Hospital filed a Renewed Motion for Summary Judgment (App. at 360) which was granted by the district court in its Order and Opinion of May 6, 1987 (App. at 60). While acknowledging that the hearing transcript contained evidence raising factual disputes between Dr. Miller and the Hospital, the court held that the Hospital's findings were supported by such relevant evidence as a reasonable mind might accept as adequate, *i.e.*, substantial evidence (App. at 65). The court further found that the termination process did not involve substantially defective procedures.

Dr. Miller filed a timely appeal to the United States Court of Appeals for the Third Circuit on the ground that use of the substantial evidence test as a standard for summary judgment improperly disregards the traditional and accepted requirement that the evidence and reasonable inferences therefrom of the non-moving party be accepted as true. Further, Dr. Miller contended

that this standard shifts to one of the parties in interest (the Hospital) those functions traditionally left to the jury. Additionally, application of the substantial evidence test in deciding the motion for summary judgment precluded the court from considering all the circumstances and evidence bearing on antitrust liability, in contravention of the well-settled requirements set forth by this Court and the other federal courts. Matters which Dr. Miller had placed upon the record, but which were ignored under the substantial evidence standard, included evidence that the outcome of the Hospital's termination proceedings against Dr. Miller had been predetermined by the Hospital well in advance of the hearings themselves. Further, the evidence showed that Dr. Miller was the victim of unequal treatment, as compared to other physicians, at the hands of the Hospital in the application of its standards for making staff privileges decisions. Moreover, the evidence established that the unequal treatment and predetermined outcome of the hearing were motivated by a desire to eliminate Dr. Miller as a competitor in the medical services industry in Indiana County.

The Court of Appeals accepted Dr. Miller's position that the standard used to dismiss his action was aberrant from the proper legal standard. The court did not reach the specific question of whether substantial evidence existed since, as a matter of law, that standard when used at summary judgment does not provide the usual protections of traditional summary judgment standards. The court held that the mere fact that an antitrust action involves hospitals does not warrant a deviation from traditional antitrust summary judgment standards. Accordingly, the court reversed the district court's order granting the Hospital's motion for summary judgment and remanded the case for further proceedings.

The Hospital sought a Rehearing *En Banc* on the ground that the public policy of encouraging physicians to participate in staff privilege decisions may be chilled by the application of traditional summary judgment legal standards in this context. The Court of Appeals, however, denied the Hospital's Petition for Rehearing, by Order dated April 22, 1988.

The Hospital now petitions for certiorari. Dr. Miller files the instant response in opposition to that petition.

Summary of Argument

The Court of Appeals for the Third Circuit properly reversed the summary judgment which had been entered on the basis of an aberrant legal standard for summary judgment in hospital staff privilege antitrust cases. The legal standard struck down by the Court of Appeals did not provide the same protection against unwarranted dismissals as traditional summary judgment standards and was inconsistent with the decisions of this Court.

As recently as May of this year, this Court refused to create an exemption for staff privilege decisions from the antitrust laws based on any claim that public health would be detrimentally affected. That result is specifically what the Hospital seeks in this Petition. Moreover, recent legislative enactments diminish, if not eliminate, the impact of antitrust liability in deterring peer review participation by physicians.

Reasons for Denying the Writ of Certiorari

The Hospital here has not questioned the existence of genuine issues of material fact in the case at bar, when the record is analyzed by traditional antitrust summary judgment standards. Rather, its position is that, when a hospital or physicians are defendants in an antitrust suit, a court considering a motion for summary judgment need not consider all of the factual circumstances bearing on antitrust liability. The Hospital argues that, if a hospital's reasons for terminating staff privileges are supported by substantial evidence and substantially fair procedures were employed in the termination decision, then the hospital and participants in the decision are immune from application of the antitrust laws. This is true regardless of the quantum of evidence which otherwise demonstrates the motivation of the hospital to suppress competition. No opinion of this Court or the Courts of Appeals has ever sanctioned such immunity from the antitrust laws. Other than the instant action, the only case known to Respondent abrogating traditional summary judgment standards in this context is *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D.Pa. 1982).

The Hospital here posits that a physician determined by the Hospital to be incompetent should not be entitled to relief under the antitrust laws especially when the Hospital's decision has been said to satisfy the substantial evidence test. Until the Court of Appeals rejected that position, no court ever considered the strong evidence in the case at bar that the Hospital's general standards for accepting and retaining physicians on staff were far exceeded by Dr. Miller. Indeed, no court had considered the evidence that Dr. Miller had

been singled out from other physicians for disparate treatment because he posed an economic threat to the Hospital and others, and not because of any claim of incompetence. The decision to remove Dr. Miller from staff had been made by the Hospital prior to the alleged conduct of Dr. Miller which formed the basis for the Hospital's claim of incompetence against him.

The application of the substantial evidence test is an inadequate summary judgment standard since it inherently does not guard against or weed out those staff privilege decisions which are in fact designed to eliminate competition in contravention of the antitrust laws. The general application of this standard of review assumes good faith on the part of the governmental agency charged with drawing a particular conclusion, and the reviewing court defers to that agency's good faith decision by not substituting its own conclusions for that of the agency.[1] The use of staff privilege termination proceedings as a means to eliminate competition in violation of the antitrust laws would remain undetected

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[1] The Hospital's decision here on Dr. Miller's incompetency is an excellent example of how the substantial evidence test does not represent a thorough review of the facts. While seven well qualified physicians testified that Dr. Miller's care of the particular patient met all acceptable medical standards, only one physician opined that it did not. That one physician testified without any advance notice having been given to Dr. Miller's counsel, as required by Hospital by-laws. As was discovered much later, that one physician failed to disclose in questioning at the hearing that he was, at the time, a client of the attorney representing the Hospital in the hearing. The Hospital relied exclusively on the opinion of this expert in finding Dr. Miller incompetent. While that finding might satisfy the substantial evidence test, other reasonable minds might discern a motivation on the part of the Hospital other than patient welfare in making that finding. Exh. Vol. 1 at 199, 252, 293, 77, 124, 149, 180; App. at 205, 206; Exh. Vol. 2 at 539; App. at 207.

under the summary judgment standards struck down by the Court of Appeals in this case. A victim of such illegal conduct should be entitled to all antitrust remedies.

In reversing the grant of summary judgment here, the Court of Appeals recognized that the standard used was not consistent with the opinions of this Court. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), it was stated as follows:

> Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. 477 U.S. at 255.

By supplanting this traditional standard with a substantial evidence test, the jury is precluded from carrying out these functions. Further, by application of the substantial evidence test, where a finding may be upheld even though reasonable minds may differ, *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 477 (1951), the court is relying on the weight of evidence and inferences as determined by the moving party. The deference which a reviewing court must give to an administrative agency decision under the substantial evidence test, *see, Universal Camera Corp., supra*, is misplaced upon the decisions made by those operating a private hospital, especially in the face of evidence of record which indicates that the outcome of the termination process was predetermined and was the result of anticompetitive motives.

The failure of the substantial evidence standard, as applied in a summary judgment proceeding, to consider the evidence of record specifically bearing on antitrust liability, including evidence of unequal treatment, a predetermined outcome and anticompetitive motives, is contrary to the requirement that a party's conduct be analyzed in light of the entire factual setting, giving consideration to all circumstances bearing on antitrust liability. *First National Bank of Arizona v. Cities Service Company,* 391 U.S. 253 (1968) and *Matsushita Electric Industrial Company v. Zenith Radio Corporation,* 475 U.S. 574 (1986).

The fact that physicians as professionals are involved in staff privilege decisions does not warrant judicially created standards exempting them from the application of the antitrust laws. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). While a ruling on certain actions of professionals may require consideration of the professional setting which differs from a purely business setting, the language of the Sherman Act does not support a Congressional intent to condone the suppression of competition by physicians and hospitals through the otherwise legal activity of peer review. *Goldfarb, supra.* The mere fact that professional conduct, whether in the form of an ethical rule precluding any customer price comparisons or peer review activities, is designed to assure quality professional services and thereby protect the public health, safety and welfare does not place such conduct beyond the reach of the antitrust laws. *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978).

The Hospital here in seeking a writ of certiorari relies heavily on the contention that the mere threat of antitrust liability will chill physician participation in peer review and will thereby diminish the quality of health care nationally. This Court has recently refused to accept this contention as a basis to depart from traditional antitrust principles as applied to hospital staff privilege decisions. *Patrick v. Burget*, 56 U.S.L.W. 4430 (May 16, 1988). In *Patrick*, the physicians were explicitly informed that such an argument is properly addressed to Congress, and not to the courts. Thus, this Court has already specifically refused to create judicially the relief the Hospital seeks here, namely an immunity from antitrust laws for medical peer review decisions.

Finally, it must be noted that Congressional action in passing the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§11101 *et seq.*, undermines the Hospital's contention that the instant action will have far-reaching impact on the public health and welfare. This Act provides a clear statement of the extent to which Congress intends staff privilege decisions to be exempt from the antitrust laws. The decision made by the Hospital in the instant case is not one of them. Even assuming a nexus between the application of antitrust laws and the quality of medical care, there is no need here, in light of this Congressional action, to consider whether the need for unfettered staff privilege decisions outweighs the national policy of competition.

Conclusion

The decisions of this Court and all federal Courts of Appeals are in harmony with the decision of the Court of Appeals for the Third Circuit on the issue involved herein. Moreover, no special circumstances exist in the case at bar as would warrant further consideration by this Court of the issues presented regarding antitrust immunity for medical care providers. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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